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APPLICATION NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTY. DOCKET NO.
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09/014.518 01/28/98 THOMPSON

R	5355-RE02
EXAMINER	

IM71/0818

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GRAY	PAPER NUMBER
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1774
DATE MAILED:

08/18/98

This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS

OFFICE ACTION SUMMARY

☒ Responsive to communication(s) filed on 5-28-98

☐ This action is **FINAL**.

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 D.C. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 1 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

Disposition of Claims

- ☒ Claim(s) 1-15 is/are pending in the application.
Of the above, claim(s) _____ is/are withdrawn from consideration.
- ☐ Claim(s) _____ is/are allowed.
- ☒ Claim(s) 1-15 is/are rejected.
- ☐ Claim(s) _____ is/are objected to.
- ☐ Claim(s) _____ are subject to restriction or election requirement.

Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The drawing(s) filed on _____ is/are objected to by the Examiner.
- ☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- ☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been
- ☐ received.
- ☐ received in Application No. (Series Code/Serial Number) _____
- ☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____

☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

- ☒ Notice of Reference Cited, PTO-892
- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- ☐ Interview Summary, PTO-413
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Notice of Informal Patent Application, PTO-152

-SEE OFFICE ACTION ON THE FOLLOWING PAGES--

Art Unit: 1774

DETAILED ACTION

This Office Action is based upon the merged Reissue Application Examination and Reexamination Proceeding which has been conducted on the basis of the rules relating to the broader reissue application examination. Accordingly, the examiner has applied the reissue statute, rules and case law to the merged proceeding. It should be noted that the Reissue Application has claims 1-15 and the Reexamination Application has claims 1-2 and 4-11 (3 has been canceled). Claims 1-15 will be examined as found in the Reissue application notwithstanding the cancellation and other amendments found in the Reexamination application.

Reissue Applications

1. The patent sought to be reissued by this application is involved in litigation. Any documents and/or materials which would be material to the patentability of this reissue application are required to be made of record in reply to this action.

Due to the related litigation status of this application, EXTENSIONS OF TIME UNDER THE PROVISIONS OF 37 CFR 1.136(a) WILL NOT BE PERMITTED DURING THE PROSECUTION OF THIS APPLICATION.

2. Applicant is reminded of the continuing obligation under 37 CFR 1.56 to timely apprise the Office of any litigation information, or other prior or concurrent proceeding, involving Patent No. 5,472,790 , which is material to patentability of the claims under consideration in this reissue

Art Unit: 1774

application. This obligation rests with each individual associated with the filing and prosecution of this application for reissue. See MPEP §§ 1404, 1442.01 and 1442.04.

3. Claims 1-15 are rejected under 35 U.S.C. 251 as being broadened in a reissue application filed outside the two year statutory period.

More specifically, claims 1-15, amended as method of use claims, enlarge the scope of the claims of the patent because the subject matter defined by the invention embraces the flexible sheet as well as the additional invention of the method of using said flexible sheet and the method steps associated therewith.

In addition, claims 10 and 11, enlarge the scope of the claims of the patent because the thickness, hardness and flexibility of the patent claims are properties associated with the polymer used to make the sheet and sheet formed therefrom. The means-plus-function language of "hardness means and thickness means", "flexibility means" (claim 10) and "means for resisting curling", "hardness means and thickness means", "flexibility means" (claim 11) results in claims wherein the hardness, flexibility and thickness are not properties of the polymer nor sheet formed therefrom, but can result from separate additional components such as a layer of sheet metal or paneling.

Art Unit: 1774

Claim Rejections - 35 USC § 112

4. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

5. Claims 14 and 15 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

More specifically, the limitation of a thickness between 0.015 inches and 0.040 inches is new matter because the specification, while disclosing a broad thickness range of 0.008 inches to 0.060 inches provides no suggestion or guidance as to the narrower range as claimed by applicants. A narrower claim can be objectionable as based on subject matter not disclosed in the application as filed, since the statutory prohibition against new matter applies to narrowing as well as broadening disclosure. *Ex parte Bachelder et al.* 131 USPQ 38.

6. Claims 1, 10-12 and 14 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for a sheet having sufficient cantilever beam strength to support an article weighing at least 5 ounces spaced at distances of as great as 12 to 14 inches from the end, does not reasonably provide enablement for distances as low as 10 inches. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the invention commensurate in scope with these claims.

Art Unit: 1774

There is no support or suggestion in the specification as originally filed that distances as low as 10 inches would function as intended by applicants. It should be noted that this limitation is found in an original claim which is part of the disclosure of an application. Accordingly, amending the specification to introduce subject matter set forth therein would not constitute new matter.

7. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

8. Claims 10-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

More specifically, claims 10 and 11 are indefinite because the limitations drawn to the "thickness means", "hardness means" and "flexibility means" are limitations associated with the properties of the sheet and polymer. The subject matter defined by the invention, when read in light of the specification, embraces specific physical properties of the polymer. It is not clear as to how a physical property, such as Rockwell hardness, constitutes a "means" within the definition of "means-plus-function" language. Furthermore, the requisite flexibility would be an inherent property of a polymeric sheet of the claimed critical dimensions and hardness, hence, this also would constitute a property of the sheet. Accordingly, the subject matter defined by the invention of claims 10 and 11 is indefinite because the metes and bounds of that which applicants regard as their invention is not clear.

Art Unit: 1774

Also, in claim 10, line 9, and claim 11, line 12, the language of "accommodating flexure of said into an arcuate trough shape" is indefinite because it is not clear as to what is being referred to.

For the record, the following is the position of the examiner:

1. Polypropylene of Rockwell hardness between 72 and 90 was well known in the art at the time the invention was made. See October 1991 issue of "Modern Plastics Encyclopedia", pages 414-417 and Declaration of Paul K. So.

2. Polypropylene of flexural modulus in the range of 75,000 to 200,000 psi was well known in the art. See October 1991 issue of "Modern Plastics Encyclopedia" pages 414-417, and Declaration of Paul K. So.

3. The flexible cutting mat described in UK Patent Publication GB 2,248,177 is essentially the same as the Rosmat flexible cutting mat described in the Rosmat printed brochures. See Declaration of John Cox on August 8, 1997.

4. Polypropylene sheets of .039 inches and .058 inches were commercially available and used as cutting boards at the time the invention was made. See "VITRAPAD" product data sheet, Stanley Smith & Co., Plastics Ltd. and Amari product information brochure. (Exhibit 13)

5. The "Counter-Maid" product was formed from extruded polypropylene of Rockwell hardness between 72 and 90 and has a flexural modulus of 210,000 psi.

Art Unit: 1774

Claim Rejections

Claim Rejections - 35 USC § 102

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(f) he did not himself invent the subject matter sought to be patented.

10. Claim 10 is rejected under 35 U.S.C. 102(a) as being anticipated by UK Patent Publication No. GB 2248177(hereinafter the publication).

More specifically, the publication teaches a method for using a flexible cutting mat for food preparation and flexible cutting mat comprising providing a sheet of flexible resilient plastic material of the type set forth by applicants, placing said mat on a flat surface, cutting a food article on said mat using a knife, forming the mat into a guide channel, lifting the mat and tipping the food pieces along the guide channel into a clean receptacle or waste, essentially as claimed in claim 10.

Therefore, the publication anticipates the present claimed invention of claim 10.

11. Claims 10-11 are rejected under 35 U.S.C. 102(b) as being anticipated by the Rosmat printed brochures.

Art Unit: 1774

The Rosmat printed brochures teach a flexible cutting mat and method of using said mat, comprising providing a mat of flexible plastic material, placing said mat on a flat surface, placing a food article on said mat, cutting said food article on said mat using a knife to produce cut pieces, flexing said mat to define an arcuate trough shape, lifting said mat in said arcuate trough shape off said flat surface support said cut pieces and funneling said cut pieces off said mat in said arcuate trough shape. In addition, the Rosmat brochures teach a flexible cutting mat essentially as claimed in claim 11, comprising a flexible resilient plastic material, said mat having means for resisting curling when placed on a flat surface, said mat having a width greater than six inches and a length greater than ten inches, said mat having hardness means and thickness means for inhibiting perforation by a knife when food articles are cut upon it and said mat having flexibility means for accommodating flexure of said mat into an arcuate trough shape having sufficient cantilever beam strength when flexed around a longitudinal centerline and held proximate a first end to support an article spaced at least ten inches from said first end weighing at least five ounces.

Therefore, the Rosmat printed brochures anticipate the method for using a flexible cutting mat and said mat essentially as claimed in claims 10 and 11.

12. Claims 10 and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by "Counter-Maid" printed product brochures (Exhibit 7, page 34).

The "Counter-Maid" printed product brochures teaches a flexible cutting sheet and method for using said flexible cutting sheet for food preparation. Said flexible cutting sheet and

Art Unit: 1774

method for using said sheet being essentially as claimed by applicants in claims 10 and 11, comprising, providing a sheet of flexible resilient plastic material having no tendency to curl, placing said sheet on a flat surface, placing a food article on said sheet, cutting said food article on said sheet using a knife, flexing said sheet to define an arcuate trough shape, lifting said sheet in said shape and funneling said cut pieces off said sheet. In addition, the flexible cutting sheet has a means for resisting curling when placed on a flat surface, a hardness means and thickness means for inhibiting perforation by a knife when food articles are cut upon it, and flexibility means for accommodating flexure of said sheet into an arcuate trough shape having sufficient cantilever beam strength when flexed around a longitudinal centerline. Properties such as being able to support an article spaced at least ten inches from said first end weighing at least five ounces is inherent. The printed product brochure is silent as to the specific dimensions; however, in view of the drawing of the woman and the relative proportion of the flexible cutting mat to the woman, the skilled artisan would immediately envisage a flexible cutting mat within the claimed range. "Proper test of description in publication as bar to patent as clause is used in 35 U.S.C. 102(b) requires determination of whether one skilled in art to which invention pertains could take description of invention in printed publication and combine it with his own knowledge of particular art and from this combination be put in possession of invention on which patent is sought..." *In re Sasse*, 207 USPQ 107, 111.

Therefore, the "Counter-Maid" printed product brochures anticipate the flexible cutting sheet and method of using essentially as claimed in claims 10 and 11.

Art Unit: 1774

13. Claim 11 is rejected under 35 U.S.C. 102(b) as being anticipated by the Allied Resinous product information, Exhibit 14, pages 232, 233 and 241.

The Allied Resinous printed product information discloses sheets of a plastic material in thicknesses as thin as 0.020 inches and in sheet sizes having a width greater than six inches and a length greater than ten inches. In addition, the product information discloses a flexural modulus and a Rockwell hardness range which inherently would result in a sheet having means for resisting curling when placed on a flat surface, hardness means and thickness means for inhibiting perforation by a knife when food articles are cut upon it, and flexibility means for accommodating flexure of said sheet into an arcuate trough shape having sufficient cantilever beam strength when flexed around a longitudinal centerline. Regarding the language of "for food preparation" it is the examiner's position that this language in the preamble is functional language which adds no patentable weight to the sheet.

Therefore, the disclosure of the Allied Resinous printed product information anticipates the flexible cutting sheet of claim 11.

14. Claims 1-15 are rejected under 35 U.S.C. 102(b) based upon a public use or sale of the invention.

More specifically, the "Counter-Maid" printed product brochures disclose a flexible cutting sheet and method for using said flexible cutting sheet for food preparation, said method steps being essentially as claimed by applicants. This flexible cutting sheet is of the claimed critical dimensions and inherently has the requisite Rockwell hardness. As to the flexural modulus

Art Unit: 1774

it is the examiner's position that the flexural modulus of the "Counter-Maid" product would have rendered obvious the flexural modulus of the present claimed invention. As such, the method of using the "Counter-Maid" product fully anticipates and renders obvious the present claimed invention of claims 1-15.

The declaration of William Fishman, Exhibit 7, pages 30-34, establishes that in 1980, the inventor of the "Counter-Maid" product contacted him for a joint attempt to market this product and that in 1981 extending into 1982, the "Counter-Maid" product was offered for sale and sold in various retail outlets in California.

It is the position of the examiner that "[a]ny 'non-secret' use of an invention by someone unconnected to the inventor, such as someone who has independently made the invention, in the ordinary course of business for trade or profit may be a 'public use,'" *Bird Provisions Co. v. Owens Country Sausage*, 197 USPQ 134, 138-40. In the instant case, the method of using the "Counter-Maid" product fully anticipates and renders obvious the present claimed invention. Therefore, it can be construed that inventor of the "Counter-Maid" product and method of using said product had independently made that which applicants' regard as their invention and resulted in a 'non-secret' use of said invention in the ordinary course of business for trade or profit, thus constituting public use.

In the alternative, it is the examiner's position that "[a]n impermissible sale has occurred if there was a definite sale or offer to sell, more than 1 year before the effective filing date of the U.S. application and the subject matter of the sale, or offer to sell, fully anticipated the claimed

Art Unit: 1774

invention or would have rendered the claimed invention obvious by its addition to the prior art.”

Ferag AG v. Quipp Inc., 33 USPQ2d 1512, 1514 (Fed. Cir. 1995). In addition, it is the examiner’s position that “merely offering to sale a product by way of an advertisement or invoice may be evidence of a definite offer for sale or a sale of a claimed invention even though no details are disclosed” and “[s]ale or offer for sale of the invention by an independent third party more than 1 year before the filing date of applicant’s patent will bar applicant from obtaining a patent.” MPEP 2133.03(b) Clearly the declaration of William Fishman in combination with the “Counter-Maid” printed product brochures establish a definite offer to sell, thereby resulting in an impermissible sale.

15. Claims 1-11, 14 and 15 are rejected under 35 U.S.C. 102(b) based upon a public use or sale of the invention.

More specifically, applicant in his Supplemental Reissue Declaration, admits that a flexible cutting mat having a thickness in the range of 0.008-0.030 inches was sold more than one year prior to the filing of the CIP application on June 13, 1994. It is the examiner’s position that the referenced flexible cutting mat is essentially that which is set forth in the subject matter defined by the invention in claims 1-11 and that properties such as Rockwell hardness and flexural modulus are inherent. It is also the examiner’s position that the method of using said flexible cutting mat and steps associated therewith would have been obvious to one of ordinary skill in the art at the time the invention was made.

Art Unit: 1774

Therefore, it is the examiner's position that in view of applicant's admission, there is a "public use" within the meaning of 35 U.S.C 102(b) and that an impermissible sale of the subject matter defined by the invention has occurred.

16. Claims 1-11 are rejected under 35 U.S.C. 102(f) because the applicant did not invent the claimed subject matter.

More specifically, applicant in his Supplemental Reissue Declaration admits on the record that the flexible cutting mat known as "Counter-Maid" was what spurred him to make his invention. In addition applicant admits that during the 1980s he obtained a sheet of plastic that was being marketed by another as "a flexible cutting mat on which one could cut food and then flex the mat to funnel the cut food into a bowl", further admitting that he obtained a copy of a "Counter- Maid" Product Brochure from the individual marketing the sheet and that this person was the publisher of said Brochure in or about 1983. As can be seen and as set forth previously, the "Counter-Maid" printed product brochure fully anticipates the present claimed method for using a flexible sheet for cutting and handling food articles essentially as claimed, the claimed critical Rockwell hardness is inherent in the "Counter-Maid" plastic material and the flexural modulus and thickness are rendered obvious by the flexural modulus and thickness of said "Counter-Maid" plastic material.

It is the examiner's position that where it can be shown that an applicant "derived" an invention from another, a rejection under 35 U.S.C. 102(f) is proper. It is also the examiner's position that "[d]erivation requires complete conception by another and communication of that

Art Unit: 1774

conception by any means to the party charged with derivation prior to any date on which it can be shown that the one charged with derivation possessed knowledge of the invention.” *Kilbey v. Thiele*, 199 USPQ 290,294. See MPEP 2137.

Therefore, it is the position of the examiner that applicant’s admission indicates complete conception by another of the subject matter defined as the invention in claims 1-5 and 10-11, and that communication of that conception to applicant, prior to any date of record on which it can be shown that applicant possessed knowledge of the invention, has occurred.

Claim Rejections - 35 USC § 103

17. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

18. Claims 1-9 and 11-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over UK Patent Publication No. GB 2248177 as applied above to claim 10 (paragraph 10)(hereinafter the publication) in view of Modern Plastics Encyclopedia (October 1991 Issue)(hereinafter “Modern Plastics”).

As set forth previously, the publication teaches a method for using a flexible cutting mat for food preparation and flexible cutting mat comprising providing a sheet of flexible resilient plastic material of the type set forth by applicants, placing said mat on a flat surface, cutting a

Art Unit: 1774

food article on said mat using a knife, forming the mat into a guide channel, lifting the mat and tipping the food pieces along the guide channel into a clean receptacle or waste. In addition, the publication teaches that the plastic material can be polypropylene and has a thickness in the range of .8mm and 2.0mm (.0315 inches - .079 inches). The publication is silent as to the specific properties of the plastic material such as Rockwell hardness and flexural modulus.

"Modern Plastics" discloses commercially available unfilled polypropylene having a Rockwell hardness in the range of R80-R102 for homopolymer polypropylene and R65-R96 for copolymer polypropylene and flexural modulus values in the range of 170,000-250,000 psi for homopolymer polypropylene and 130,000-200,000 psi for copolymer polypropylene.

While the publication is silent as to the specific type of polypropylene contemplated, it is the examiner's position that it would have been obvious to one of ordinary skill in the art at the time the invention was made, to use any commercially available polypropylene known in the art, such as polypropylene of the claimed critical hardness and flexural modulus, with the reasonable expectation of success of producing a flexible cutting mat having lay-flat characteristics and sufficient cantilever beam strength such that it can be used for cutting and handling food articles. Moreover, the skilled artisan would immediately envisage this flexible cutting mat used in the method steps contemplated by the Publication.

Regarding the dimensions of the flexible mat, these would have been obvious to modify commensurate with the desired end use. Furthermore, changes in size and shape are not construed to be a matter of invention. In addition, it is the examiner's position that the teaching

Art Unit: 1774

of a thickness of .0315 inches is sufficiently close to applicant's claimed thickness of 0.030 inches that one skilled in the art would have expected the mats to have the same properties.

19. Claims 1-8 and 12-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over the Rosmat printed brochures, as applied previously to claims 10-11, in view of "Modern Plastics Encyclopedia" (October 1991 Issue; pages 414-417) as applied above to claims 1-9 and 11-15 (hereinafter "Modern Plastics"), further in view of "VITRAPAD", product data information sheets, Stanley Smith & Co., Plastics Ltd. and Amari product information brochure (Exhibit 13).

The Rosmat printed brochures disclose a flexible cutting mat and method of using said mat, said method being essentially as claimed by applicant. In addition, Rosmat discloses that the mat can be formed from polypropylene having a width and length within the claimed range but does not teach the specific properties of the polypropylene. In addition, Rosmat is silent as to the thickness of the mat.

"Modern Plastics", as set forth previously, discloses commercially available polypropylene having the claimed critical properties as set forth by applicant. It would have been obvious to one of ordinary skill in the art at the time the invention was made, to form the Rosmat mat from commercially available polypropylene, such as that contemplated by applicants, with the reasonable expectation of producing a flexible cutting mat with no tendency to curl when placed upon a flat surface and with sufficient strength such that when flexed the cutting mat is capable of supporting articles placed thereon. As to the thickness of the Rosmat flexible cutting mat, it is the

Art Unit: 1774

examiner's position that this would have been obvious to choose and determine during routine experimentation commensurate with the desired properties of the end product. Furthermore, as stated on the record, polypropylene cutting boards having thicknesses within the claimed critical range was well known in the art at the time the invention was made. See "VITRAPAD" product data sheets and Amari product information sheets, cited to show the state of the art at the time the invention was made. Thus it is the examiner's position that applicant's claimed critical thickness range of 0.030 inches and 0.060 inches is no more than that which can be construed to have been conventional at the time the invention was made. In the alternative, it is the examiner's position that, as stated on the record, the Rosmat flexible cutting mat is essentially the same as the flexible cutting mat disclosed in the publication, GB 2,248,177. Accordingly, the thickness of the Rosmat flexible cutting mat necessarily is embraced by the ranges of the flexible sheet set forth in the claims, thereby rendering obvious said thickness range.

Response to Protest

The protests filed May 29, 1998 and June 5, 1998 have been fully considered and all major arguments and points raised that are within the jurisdiction of the examiner have been addressed in paragraphs 3, 8, 11, 12, 14 and 16 above.

Art Unit: 1774

Response to Petition for Public Use Proceedings

The petition for Public Use proceedings has been noted. After mailing of this Office Action, the petition and this file will be forwarded to the Special Program Law Office for further consideration.

Conclusion

No claims are allowed.

In order to ensure full consideration of any amendments, affidavits or declarations, or other documents as evidence of patentability, such documents **must** be submitted in response to this Office Action. Submissions after the next Office Action, which is intended to be a final action, will be governed by the requirements of 37 CFR 1.116, which will be strictly enforced.

20. Any inquiry concerning this communication or earlier communications from the examiner should be directed to J. M. Gray whose telephone number is (703) 308-2381.

Serial Number: 09/014,518 and 90/004,752

Page 19

Art Unit: 1774



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August 14, 1998



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